



This document is scheduled to be published in the Federal Register on 06/23/2016 and available online at <http://federalregister.gov/a/2016-14896>, and on [FDsys.gov](http://FDsys.gov)

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5651-N-03]

### Tribal Government-To-Government Consultation Policy

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Notice of final policy statement.

**SUMMARY:** In compliance with Executive Order 13175, “Consultation with Indian Tribal Governments,” HUD adopts this Tribal Government-to-Government Consultation Policy. The purpose of this tribal consultation policy is to enhance communication and coordination between HUD and federally recognized Indian tribes and to outline guiding principles and procedures under which all HUD employees are to operate with regard to federally recognized Indian or Alaska Native tribes. This final policy statement follows publication of an April 8, 2015, request for public comment on HUD’s proposed Tribal Consultation Policy and, after consideration of the public comments submitted in response to the April 8, 2015, notice, adopts the proposed policy without change.

**FOR FURTHER INFORMATION CONTACT:** Heidi J. Frechette, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 4126, Washington, DC 20410, telephone number 202-401-7914 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number).

### SUPPLEMENTARY INFORMATION:

#### Background

Executive Order 13175 (65 FR 67249, published November 9, 2000) recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination. Among other things, it requires that agencies have an accountable process to ensure meaningful and timely input by tribal officials in developing policies that have tribal implications. On November 5, 2009, President Obama reaffirmed the government-to-government relationship between the Federal Government and Indian tribal governments in a White House memorandum that acknowledges that Indian tribes exercise inherent sovereign powers over their members and territory. The November 5, 2009, memorandum also acknowledged that the United States will continue to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

#### **Development of HUD Tribal Government-to-Government Consultation Policy**

Consistent with Executive Order 13175, and the Presidential memorandum of November 5, 2009, HUD undertook a series of consultations and requested public comment on this consultation policy statement. Beginning in January 2010, HUD held a series of HUD-tribal regional consultations to discuss HUD's existing tribal consultation policy. Each consultation session was hosted by one of the six Office of Native American Programs (ONAP) Area Office Administrators. Prior to all meetings, the ONAP Area Office sent out invitation letters to all tribes and tribally designated housing entities to inform them of the meetings. The invitation package included the President's memorandum, Executive Order 13175, HUD's current tribal consultation policy, and a list of questions designed to prompt discussion and focus on the issues. HUD's Deputy Assistant Secretary for ONAP attended a Northwest ONAP and Eastern/Woodlands ONAP session, and HUD's Assistant Secretary for Public and Indian

Housing participated in the initial session held in Suquamish, Washington. Participants at each of the consultation sessions were informed that an electronic mailbox had been established to receive their comments and that HUD's CODETALK website would be used to display all comments received. The comments from participants who attended these consultations, as well as all comments received by other means, were consolidated by HUD's ONAP. HUD carefully reviewed all comments received from all sources, responded, and made changes to the existing HUD consultation policy based on these comments, as appropriate.

HUD conducted a second round of tribal consultation by sending the revised draft policy to all tribal leaders for their comment. On November 12, 2014, the Department provided all tribal leaders a draft version of HUD's revised tribal government-to-government consultation policy and requested their feedback and opinion on the draft. In response to the Department's November 12, 2014, request for comments, the Department received three comments from Indian tribes and a national organization that represents the housing interests of Native Americans.

More recently, on April 8, 2015, at 70 FR 18858, HUD published a Federal Register notice requesting public comment on its tribal government-to-government consultation policy. HUD published this notice consistent with Executive Order 13175 and a November 5, 2009, Presidential memorandum that reaffirms the government-to-government relationship between the Federal Government and Indian tribal governments. HUD received eight public comments on the notice. Comments were received from tribes and tribal housing authority officials, nonprofits, advocacy groups, and interested members of the public. After considering public comment, HUD decided not to make any changes to its draft policy published on April 8, 2015. As a result, this notice establishes HUD's Tribal Government-to-Government Consultation

Policy. HUD would like to respond, however, to several comments received in response to its April 8, 2015, request for comments.

Comment: Consultation Requires Negotiated Rulemaking. One commenter stated that the consultation policy should recognize that any changes to regulations that directly impact tribes or tribal members require negotiated rulemaking. According to the commenter, there have been changes to regulations that had a direct, negative impact upon tribal members, and the only consultation performed was a “Dear Tribal Leader” letter. The commenter stated that the new consultation policy should prevent those lapses in the future by enshrining a mandatory negotiated rulemaking prior to these kinds of changes.

HUD Response: HUD disagrees that negotiated rulemaking is required for all of HUD’s regulatory actions that impact the tribes. Rather, section 106 of the Native American Housing and Self-Determination Act (NAHASDA), as amended, limits negotiated rulemaking to ‘any regulation that may be required pursuant to requirements made to [NAHASDA] after the effective date of enactment of this Act [October 1, 2008].’ See 25 U.S.C. 4116(b). Procedures for implementing this requirement were recently codified in 24 CFR 1000.9. As a result, while negotiated rulemaking is required under the Indian Housing Block Grant program, HUD believes that negotiated rulemaking is only one method of tribal consultation, and that there are other forms of consultation that ensure tribal participation in HUD policy that might affect the tribes.

Comment: Policy Should Make Clear that Tribes Can Initiate Consultation. One commenter stated that the policy as written only addresses the initiation of consultation by HUD and does not address the ability of tribes to initiate consultation with HUD on any specific issue or proposed policy that has tribal implications. The commenter recommended that the policy be revised to clarify that tribes can initiate consultation and that this right in no way alleviates

HUD's regular and ongoing obligation to initiate and engage in meaningful consultation with individual tribes.

HUD Response: HUD agrees with the commenter that consultation can be initiated by the tribes. HUD is not making this change, however, since nothing in this consultation policy prevents tribe from contacting or initiating consultation with HUD.

Comment: Policy Must Address Confidentiality of Tribal Interests. One commenter, citing Pueblo of Sandia v United States, 50 F.3d 856, 861-62 (10th Cir.1995), stated that it is critical to engage in tribal consultation in a manner that exhibits sensitivity to and respect for tribal confidentiality concerns regarding cultural, religious, political, and other intra-tribal affairs. According to the commenter, the current draft policy does not contain any provision to address the confidentiality of tribal interests. As a result, the commenter recommended that the policy be revised to require that HUD develop appropriate safeguards and policies to ensure adequate protection of tribal confidentiality interests throughout the entire consultation process.

HUD Response: HUD appreciates the comment and shares the commenter's concerns regarding the importance of ensuring the confidentiality of tribal interests when appropriate. HUD also believes, however, that consultation and collaboration as envisioned by Executive Order 13175 and the Presidential memorandum of November 5, 2009, require transparency and fairness with all tribes to build trust among the tribes and the Federal Government. Notwithstanding, HUD will be sensitive to tribal confidentiality interests throughout the entire consultation policy.

## **HUD Tribal Government-to-Government Consultation Policy**

### **I. INTRODUCTION**

A. The United States Government has a unique relationship with American Indian

governments as set forth in the Constitution of the United States, treaties, statutes, judicial decisions, and Executive orders and Presidential memorandums.

B. On April 29, 1994, a Presidential memorandum was issued reaffirming the Federal Government's commitment to operate within a government-to-government relationship with federally recognized American Indian and Alaska Native tribes, and to advance self-governance for such tribes.<sup>1</sup> The Presidential memorandum directs each executive department and agency, to the greatest extent practicable and to the extent permitted by law, to consult with tribal governments prior to taking actions that have substantial direct affect on federally recognized tribal governments. In order to ensure that the rights of sovereign tribal governments are fully respected, all such consultations are to be open and candid so that tribal governments may evaluate for themselves the potential impact of relevant proposals.

On May 14, 1998, Executive Order 13084, *Consultation and Coordination with Indian Tribal Government* was issued.<sup>2</sup> This Executive order was revoked and superseded on November 6, 2000, by Executive Order 13175,<sup>3</sup> which is identically titled to Executive Order 13084 and which sets forth guidelines for all Federal agencies to: (1) establish regular and meaningful consultation and collaboration with Indian tribal officials in the development of Federal policies that have tribal implications, (2) strengthen the United States government-to-government relationships with Indian tribes, and (3) reduce the imposition of unfunded mandates upon Indian tribes.

On November 5, 2009,<sup>4</sup> President Obama issued a memorandum to the heads of all

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<sup>1</sup> See <http://www.gpo.gov/fdsys/pkg/FR-1994-05-04/html/94-10877.htm>.

<sup>2</sup> See <http://www.gpo.gov/fdsys/pkg/FR-1998-05-19/pdf/98-13553.pdf>.

<sup>3</sup> See <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>.

<sup>4</sup> See <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

executive departments and agencies that reaffirmed that the United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, Executive orders, and judicial decisions. The memorandum stated that in recognition of that special relationship, pursuant to Executive Order 13175, of November 6, 2000, executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes. The memorandum stated that the Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications, and directed, among other things, as an initial step, through complete and consistent implementation of Executive Order 13175.

C. This consultation policy applies to all HUD programs and policies that have substantial direct effects on Federally recognized Indian tribal governments. In formulating or implementing such policies, HUD will be guided by the fundamental principles set forth in section 2 of Executive Order 13175, to the extent applicable to HUD programs. Section 2 of the Executive order provides as follows:

***Sec. 2. Fundamental Principles.*** In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted

numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

## **II. DEFINITIONS**

A. “Consultation” means the direct and interactive (i.e., collaborative) involvement of tribes in the development of regulatory policies on matters that have tribal implications.

Consultation is the proactive, affirmative process of: (1) identifying and seeking input from appropriate Native American governing bodies, community groups, and individuals; and (2) considering their interest as a necessary and integral part of HUD’s decisionmaking process.

This definition adds to statutorily mandated notification procedures. The goal of notification is to provide an opportunity for comment; however, with consultation procedures, the burden is on the Federal agency to show that it has made a good faith effort to elicit feedback.

B. “Exigent situation” means an unforeseen combination of circumstances or the resulting state that calls for immediate action in order to preserve tribal resources, rights, interests, or Federal funding.



C. “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

D. “Policies that have tribal implications” refers to regulations, legislative proposals, and other policy statements or actions that have substantial direct effects on one or more Indian tribe, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. “To the extent practicable and permitted by law” refers to situations where the opportunity for consultation is limited because of constraints of time, budget, legal authority, etc.

F. “Tribal officials” means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

### **III. PRINCIPLES**

A. HUD respects tribal sovereignty and acknowledges the unique relationship between the Federal Government and Indian tribes.

B. HUD recognizes and commits to a government-to-government relationship with federally recognized tribes.

C. HUD recognizes tribes as the appropriate non-Federal parties for making policy decisions and managing programs for their constituents.

D. HUD shall take appropriate steps to remove existing legal and programmatic impediments to working directly and effectively with tribes on programs administered by HUD.

E. HUD shall encourage States and local governments to work with and cooperate with tribes to resolve problems of mutual concern.

F. HUD shall work with other Federal departments and agencies to enlist their interest

and support in cooperative efforts to assist tribes to accomplish their goals within the context of all HUD programs.

G. HUD shall be guided by these policy principles in its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system, and ongoing policy and regulation development processes for all programs affecting tribes.

#### **IV. TRIBAL CONSULTATION PROCESS**

A. Applicability. HUD will apply this tribal consultation policy to all proposed policies that have tribal implications, to the greatest extent practicable and permitted by law. Based on a government-to-government relationship and in recognition of the uniqueness of each tribe, the primary focus for consultation activities is with individual tribes. The Office of Public and Indian Housing's ONAP, may serve, under the direction of the Secretary, as the lead HUD office for the implementation of this policy. Internal HUD policies and procedures are excluded from this policy.

B. Methods of Communication. The methods of communication used will be determined by the significance of the consultation matter, the need to act quickly, and other relevant factors. Consultation can be accomplished through various methods of communication. While modern technology and group events should be utilized whenever possible to conserve funds and respect time constraints of all those involved, generally these methods of communication should not serve in the place of formal, face-to-face discussion.

C. Consultation with Tribes When Drafting Policies That Have Tribal Implications. To the extent practicable and permitted by law, HUD shall make reasonable efforts to consult with tribal officials concerning proposed policies that have tribal implications, before such policies

are drafted, in order to facilitate greater tribal participation in development of the proposed policies. Such consultation shall include on the HUD website a notice of HUD's plans to develop such policies, and an invitation for tribal officials to comment on items that should be included in such policies. HUD shall provide a specific deadline for comments, which shall not be less than 30 days from the date of the notice. This timeline may be compressed in exigent situations.

D. Notice of Proposed Policies That Have Tribal Implications. To the extent practicable and permitted by law, after proposed policies that have tribal implications have been drafted, HUD will notify the tribes of such proposed policies and will include a copy of the proposed policies with the notice. The notice shall designate the lead office in HUD Headquarters. The lead office in HUD Headquarters shall be responsible for such notification, unless it has delegated such responsibility to another office. HUD shall provide a specific deadline for tribal comments, which shall not be less than 60 days from the date of the notice. This timeline may be compressed in exigent situations. Nothing herein shall affect the deadlines established by Federal law or regulation with regard to comments in the course of the formal agency rulemaking process for the promulgation of Federal regulations.

E. Tribal Response. Tribal officials may provide recommendations concerning proposed policies that have or that may have tribal implications to the lead office in HUD Headquarters no later than the deadline established in Part IV.D of this consultation policy. Such recommendations may be provided orally during meetings with HUD representatives or by written documents submitted to HUD representatives.

F. Meetings. Tribes may facilitate regional meetings with HUD representatives to identify and address issues relevant to HUD policies that have tribal implications. HUD will

convene at least one national tribal consultation meeting each year. To reduce costs and conserve resources to the greatest extent feasible, tribes and HUD will coordinate consultation meetings with other regularly scheduled meetings, such as multi-agency and association meetings.

G. Reporting Mechanisms. In all cases when a tribe or tribes have been involved in the consultation process, HUD will maintain an Internet website or webpage to address the informational needs of tribes and tribal leaders. Such website or webpage will include relevant HUD documents and other relevant documents, including comments submitted by other tribes. HUD shall notify the tribes of the finalization of proposed policies that have tribal implications, and provide such policies to the tribes.

H. Tribal Advisory Organizations, Committees, and Workgroups. HUD will work with tribal organizations, committees, or workgroups, when appropriate, to assist in facilitating involvement of tribes in decisionmaking and policy development. The work with tribal organizations, committees, and workgroups will be in coordination with, and not to the exclusion of, consultation with individual tribes on a government-to-government basis.

I. Joint Federal/Tribal Workgroups.

1. A workgroup may be established by HUD and tribes to address specific issues or to draft specific policies that have tribal implications. Tribal representation should be consistent with the established standard of geographically diverse small, medium, and large tribes, whenever possible.

2. Alternate workgroup members may be appointed by written notification signed by the member. Such alternates shall possess the authority of the workgroup member to make decisions on their behalf, if such authority is so delegated to them in writing.

3. The workgroup shall be chaired by at least one tribal workgroup member, selected by the tribal workgroup members, and one HUD representative.

4. The workgroup may conduct its activities through various methods of communication, including in-person meetings, conference calls, and Internet-based meeting platforms.

Workgroup members may be accompanied by other individuals for advice, as the members deem necessary.

5. Whenever possible, workgroup products should be circulated to tribal leaders for review and comment.

6. All final recommendations will be given serious consideration by HUD.

## **V. TRIBAL STANDING COMMITTEE**

On issues relating to tribal self-governance, tribal trust resources, or treaty and other rights, HUD will explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking. HUD may establish a standing committee, consisting of representatives of tribal governments, to consult on the appropriateness of using negotiated rulemaking procedures on particular matters. The procedures governing such a standing committee would be established through the mutual agreement of HUD and tribal governments.

## **VI. UNFUNDED MANDATES**

To the extent practicable and permitted by law, HUD shall not promulgate any regulation that is not required by statute, that has tribal implications, and that imposes substantial direct compliance costs on such communities, unless:

A. Funds necessary to pay the direct costs incurred by the Indian tribal government in complying with the regulation are provided by the Federal Government; or

B. HUD, prior to the formal promulgation of the regulation:

1. Consulted with tribal officials early in the process of developing the proposed regulation;
2. In a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget (OMB) a description of the extent of HUD's prior consultation with representatives of affected Indian tribal governments, a summary of the nature of their concerns, and the agency's position supporting the need to issue the regulation; and
3. Makes available to the Director of OMB any written communications submitted to HUD by such Indian tribal governments.

## **VII. INCREASING FLEXIBILITY FOR INDIAN TRIBAL WAIVERS**

HUD shall review the processes under which Indian tribal governments apply for waivers of statutory and regulatory requirements, and take appropriate steps to streamline those processes.

A. HUD shall, to the extent practicable and permitted by law, consider any application by an Indian tribal government for a waiver of statutory or regulatory requirements, in connection with any program administered by HUD, with a general view toward increasing opportunities for utilizing flexible policy approaches, at the Indian tribal level, in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

B. HUD shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 90 days of receipt of such application by HUD. HUD shall provide the applicant with timely written notice of the decision and, if the application for a

waiver is not granted, the reasons for such denial.

C. This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by HUD. Applicable civil rights statutes and regulations are not subject to waiver.

### **VIII. APPLICABILITY OF THE FEDERAL ADVISORY COMMITTEE ACT**

The provisions of the Federal Advisory Committee Act (5 U.S.C. App., Pub. L. 92-463, section 2, Oct. 6, 1972, 86 Stat. 770) (FACA) do not apply to consultations undertaken pursuant to this policy. In accordance with section 204(b) of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, approved March 22, 1995, 109 Stat. 48), FACA is not applicable to consultations between the Federal Government and elected officers of Indian tribal governments (or their designated employees with authority to act on their behalf). As OMB stated in its guidelines implementing section 204(b):

This exemption applies to meetings between Federal officials and employees and... tribal governments, acting through their elected officers, officials, employees, and Washington representatives, at which “views, information or advice” are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive order.

The scope of meetings covered by the exemption should be construed broadly to include any meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus; exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration. (OMB Memorandum 95-20 (September 21, 1995), pp. 6-7, published at 60 FR 50651, 50653 (September 29, 1995)).

### **IX. GENERAL PROVISIONS**

This document has been adopted for the purpose of enhancing government-to-government relationships, communications, and mutual cooperation between the United States

Department of Housing and Urban Development and tribes and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other persons. The provisions of FACA are not applicable to this policy. This document is effective on the date it is signed.

Date: April 4, 2016.

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Julián Castro, Secretary.

**[FR-5651-N-03]**

[FR Doc. 2016-14896 Filed: 6/22/2016 8:45 am; Publication Date: 6/23/2016]